

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7498

~~76-8317~~

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALVIN TROTMAN and FRANKLIN MITCHELL,

Plaintiffs-Appellees,

- against -

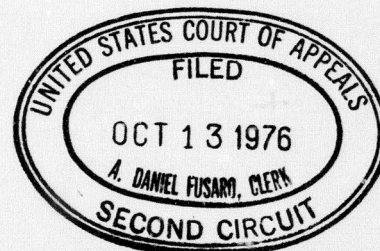
THE PALISADES INTERSTATE PARK COMMISSION,
MORGAN CLARK, JOHN DOE OFFICERS OF THE
PALISADES INTERSTATE PARK COMMISSION 1-3,

Defendants,

PALISADES INTERSTATE PARK COMMISSION,

Defendant-Appellant.

BRIEF FOR APPELLANT



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DOCKET NO. 75-4377

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- against -

THE PALISADES INTERSTATE PARK COMMISSION,
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Defendant-Appellant.

BRIEF FOR APPELLANT

Preliminary Statement

This is an appeal by defendant Palisades Interstate Park Commission, by permission pursuant to 28 U.S.C. 1292(b), from an order of the United States District Court, Southern District of New York (KNAPP, D.J.), denying a motion to dismiss on the grounds of Eleventh Amendment immunity.

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Statement of the Issues

Is the Palisades Interstate Park Commission an agency of the State of New York, sharing state sovereign immunity under the Eleventh Amendment?

The Court below held that the Palisades Interstate Park Commission was not entitled to assert Eleventh Amendment immunity.

Statement of the Case

Plaintiffs were the operator and occupant of a motor vehicle which was halted by park policemen, employees of the State of New York, assigned to the defendant Palisades Interstate Park Commission (hereinafter "Park Commission"), on the Palisades Interstate Parkway. A quantity of marijuana was found in plaintiffs' vehicle, and this fact was subsequently reported to plaintiffs' employer, the New York State Department of Correctional Services. The remaining factual background is immaterial to this appeal.

The plaintiffs have brought this civil rights action pursuant to 42 USC 1983 alleging defamation in that the Park Police informed plaintiffs' employer that plaintiffs were found in possession of marijuana (Appendix, p. 5). The only party defendant served has been the Park Commission.

The Park Commission moved to dismiss as to it on the ground of Eleventh Amendment immunity, and the motion was denied, the Honorable Whitman Knapp, D.J., holding that the defendant Park Commission was not entitled to sovereign immunity under the Eleventh Amendment (Appendix, pp. 26-29).

ARGUMENT

POINT I

THE PALISADES INTERSTATE PARK COMMISSION IS AN AGENCY OF THE STATE OF NEW YORK, AND THUS A) SHARES THE STATE'S ELEVENTH AMENDMENT IMMUNITY FROM SUIT IN FEDERAL COURT AND B) IS SUBJECT, AS IS THE STATE, TO SUIT ONLY IN THE NEW YORK STATE COURT OF CLAIMS.

A

The Palisades Interstate Park Commission is a body politic created by the legislatures of the States of New York and New Jersey and approved by Congress. Article VII of the Compact between New York and New Jersey covers tort liability:

"1. Neither the state of New York nor the state of New Jersey shall be liable for any torts of the commission, its members, officers or employees, except as provided by the laws of such state, but each member, officer and employee of the commission shall with respect to any tort committed by him in the exercise of his duties or in the course of his employment as such member, officer or employee, be deemed to be an officer or employee of the state where such tort was committed, and any liability arising from such tort shall be governed by the laws of such state."

The Legislature of New York State has also provided in section 9.09 of the Parks and Recreation Law, dealing with employees of Palisades Interstate Park Commission under subdivision 3 as follows:

"Employees of the commission whose salary is paid in full from funds appropriated by the state shall be deemed to be employees of the state in the classified civil service of the state under the provisions of the civil service law. Commission employees not deemed to be state employees hereunder shall be employees of the commission."

The State Park Police are paid in full from funds appropriated by the State of New York and are under the classified civil service of the State, and by virtue of the above-quoted Article VII of the Compact, they are to be deemed employees of the State of New York with respect to any alleged tortious conduct in the exercise of their duties.

The budget upon which the Park Commission operates, insofar as its New York State facilities are concerned, is appropriated almost entirely from New York State funds, and is subject to approval of the Legislature. Commissioners are appointed by the Governors of New York and New Jersey. Parklands in New York State are governed by Parks and Recreation Law, Article 9, and are subject to the jurisdiction of the State Commissioner of Parks and Recreation. The Park Commission therefore, so far as its New York operations are concerned, is clearly a creature of the State, performing a public function, supported by public funds from the State Treasury, and is, in reality an alter ego of the State.

B

It would seem that the surest indicia of whether a body politic, created by a legislature to perform a public function funded by State appropriations, is a State agency would be the status accorded that body politic by the courts of its own state. With regard to

the Palisades Interstate Park Commission, New York State courts have specifically held that the Park Commission is a state agency with state immunity, subject to suit, as is the State itself, only in the Court of Claims (Mercado v. State, 29 A D 2d 579 [3d Dept., 1967]; Conklin v. Palisades Interstate Park Commission, 282 App. Div. 728 [2d Dept., 1953]; Dietrich v. Palisades Interstate Park Commission, 114 Misc. 425 [Sup. Ct., N.Y. Co., 1921]). In The Onteora, 298 F. 553 [S.D.N.Y., 1923], the Federal court agreed with the state courts:

"The lower courts at least have held that the [Palisades Interstate Park Commission], despite their corporate form, are a state agency, and as such exempt from liability as tort-feasors. Kirkman v. Commissioners, 200 App. Div. 870, 193 N.Y. Supp. 60; Dietrich v. Commissioners, 114 Misc. Rep. 425, 187 N.Y. Supp. 454. The New York State Court of Appeals has never ruled directly on the point, although the New Jersey Court of Errors has. Stephens v. Commissioners, 93 N.J. Law 500, 108 Atl. 645. But the Court of Appeals has in effect said that the [Palisades Interstate Park Commission] were a state agency (Ramapo Mountains Water & Service Co. v. Commissioners, 177 App. Div. 700, 164 N.Y. Supp. 430, affirmed without opinion in 227 N.Y. 609, 125 N.E. 924), and from this it seems to follow that the state itself is not liable [cit. om.].

* * *

"[T]he [Palisades Interstate Park Commission] are not a municipal corporation, but a state agency. . . ."

All claims arising from incidents occurring on park lands within New York State have always been compensated, if at all, by appropriations and disbursements in and by the State of New York, paid out of the general funds of the State of New York. Actions against the Park Commission are defended by the New York State

Attorney General. The Park Police are employed in the classified civil service of the State of New York pursuant to the New York State Civil Service Law, and are employees of the State, paid by the State (Parks and Recreation Law, Art. 7, §§ 9.05, subd. 4 and 9.09, subd. 3).

It has often been stated that the determinative criterion of whether a body politic is a State agency for purposes of Eleventh Amendment immunity is "ultimate state liability" (Edelman v. Jordan, 415 U.S. 651 [1974]; Whitten v. State University Construction Fund, 493 F. 2d 177 [1st Cir., 1974]; Charles Simpkin & Sons, Inc. v. State University Construction Fund, 352 F. Supp. 177 [S.D.N.Y., 1973]; Breen v. Mortgage Commission, 285 N.Y. 425 [1941]). Any award herein would be paid from the general funds of New York State.

In Bennett v. Gravelle, 323 F. Supp. 203 (D.C. Md., 1971), the district court held:

"[W]hen a suit is lodged ... which will establish a liability on the state and will be payable out of the public funds of the state, the suit is in actuality 'one against the state, even though the state is not named as a defendant' (Westberry v. Fisher, 309 F. Supp. 12, 18 [S.D. Me., 1970])."

This Court has recently decided an analogous issue in Monell v. Department of Social Services of the City of New York, et al., 532 F. 2d 259 [2d Cir., 1976), citing Ford Motor Co. v. Indiana Dept. of The Treasury, 323 U.S. 459 (1945):

"The [U.S. Supreme] Court has established the principle moreover, that in Eleventh Amendment cases 'the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding', and that

'when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'"

See also Scheuer v. Rhodes, 416 U.S. 232 (1974).

The District Court hereinbelow found that the critical factor militating against immunity was the fact that Article VI of the Palisades Interstate Park Commission Compact provides that: "[t]he commission shall not pledge the credit of either state except by and with the authority of the legislature thereof." That article obviously involves contractual obligations and not tort liability. It simply means that the Park Commission cannot create obligations against the State beyond its appropriation, for goods, services, acquisition of lands, or the borrowing of capital without prior legislative approval. It does not contract away the State's ultimate liability, however, for tortious conduct on the part of the Park Commission or of state employees who work for the Park Commission.

The fact that State courts have ruled that the Park Commission can be sued in the Court of Claims would seem clearly to establish that the Compact provision relating to the pledging of credit has no bearing on ultimate State liability for tortious conduct of its agency.

The Palisades Interstate Park Commission is therefore an agency of the State of New York, a division of the State Department of Parks, and, as such, the State's Eleventh Amendment immunity is applicable to it.

POINT II

THE PALISADES INTERSTATE PARK COMMISSION
IS NOT A "PERSON" WITHIN THE MEANING OF
42 U.S.C. 1983.

A second consideration which, as Judge Knapp observed in his memorandum-order granting certification to seek permission to appeal, is intimately related to appellant's status as a State agency, is whether the Park Commission is a "person" within the meaning of sec. 1983. For purposes of this section, it is clear that a state, a department of a state, a county or agency of a county, a municipal corporation or governmental body or agency are not "persons" subject to suit (Monroe v. Pape, 365 U.S. 167 [1961]; Monell v. Dept. of Social Services, 532 F. 2d 259 [2d Cir., 1976]; Blanton v. State University of New York, 489 F. 2d 377 [2d Cir., 1973]; Wade v. Bethesda Hospital, 356 F. Supp. 1973 [S.D. Ohio, 1973]; Bennett v. Gravelle, 323 F. Supp. 203 [D.C. Md., 1971])).

Moreover, the complaint herein, in paragraphs 3 and 5 (Appendix, pp. 3, 4) names this defendant as "Palisades Interstate Park Commission Police" and acknowledges that this defendant is "a political subdivision of the State of New York." It is clear from the complaint that this defendant is being sued as if it were a police department. However, a police department is not a suable entity under sec. 1983 (Guerro v. Mulhearn, 498 F. 2d 1249 [1st Cir., 1974]; Henschel v. Worcester Police Dept., 445 F. 2d 624 [1st Cir., 1971])), since it is not a "person".

The Park Commission, therefore, being a state agency (Point I, supra), is by corollary, not a "person" within the meaning of sec. 1983.

POINT III

THE COMPLAINT SHOULD BE DISMISSED FOR OTHER JURISDICTIONAL DEFECTS:

- A. THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS;
- B. A COMPLAINT FOR DEFAMATION DOES NOT COME WITHIN THE PURVIEW OF SEC. 1983;
- C. RESPONDEAT SUPERIOR IS INAPPLICABLE TO A SEC. 1983 ACTION FOR MONEY DAMAGES.

A

The Action is Barred By the Statute of Limitations

Actions brought in Federal court under sec. 1983 are governed by the state statute of limitations (O'Sullivan v. Felix, 233 U.S. 318 [1914]; Henig v. Odorioso, 385 F. 2d 491 [3d Cir., 1967]; cert. den. 390 U.S. 1016, rehearing den. 391 U.S. 929; Polite v. Diehl, 507 F. 2d 119 [3d Cir., 1974]; Howell v. Cataldi, 464 F. 2d 272 [3d Cir., 1972]; Romer v. Leary, 425 F. 2d 186 [2d Cir., 1970]).

The complaint herein charges the defendants with "defamation" (Appendix, p. 5).

Subsection 3 of section 215 of the New York State Civil Practice Law and Rules is applicable to this complaint, and provides:

"The following actions shall be commenced within one year:

* * *

"3. An action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law."

The incident plaintiffs complain of occurred June 15, 1974 (Complaint, paragraphs 5 & 6, Appendix, p. 4). The complaint herein is dated September, 1975 and was not timely filed. This action is therefore barred by the statute of limitations, and the complaint must be dismissed.

B

A Complaint For Defamation Does Not Come Within the Purview of Sec. 1983.

The complaint herein in paragraphs 8 and 9 thereof (Appendix, p. 5) asserts that plaintiffs were not arrested, but rather that they were "defamed". Defamation however, is not a violation of a constitutional right and an action alleging defamation is not maintainable under sec. 1983 (Rosenberg v. Martin, 478 F. 2d 520 [2d Cir., 1973], cert. den. 414 U.S. 872 [1973]; Azar v. Conley, 456 F. 2d 1382 [6th Cir., 1972]; Heller v. Roberts, 386 F. 2d 832 [2d Cir., 1967]; Everett v. City of Chester, 391 F. Supp. 26 [E.D., Pa., 1975]; Schumate v. People of State of New York, 373 F. Supp. 1166 [S.D.N.Y., 1974]).

C

RESPONDEAT SUPERIOR IS NOT APPLICABLE TO A SEC. 1983 ACTION FOR MONEY DAMAGES.

Insofar as the defendant Park Commission is concerned, it is being sued herein solely and expressly under the doctrine of respondeat superior (Complaint, paragraphs 19 and 20; Appendix, pp. 7, 8). Respondeat superior is inapplicable in a sec. 1983 action for damages (Williams v. Vincent, 508 F. 2d 541 [2d Cir.,

1974]; Adams v. Pate, 445 F. 2d 105 [7th Cir., 1971]; Diamond v. Coleman, 395 F. Supp. 429 [S.D. Ga., 1975]; Mathis v. Pratt, 375 F. Supp. 301 [N.D. Ill., 1974]; Bennett v. Gravelle, 323 F. Supp. 203 [D.C. Md., 1971]).

Moreover, the individual defendants, park policemen assigned to the defendant Park Commission, are employees of the State of New York, and are not employees of the Park Commission (Parks and Recreation Law, sec. 9.09). Therefore, the defendant Park Commission could not, in any event, have any liability under respondeat superior for the activities of the park police, even if respondeat superior were applicable to this sec. 1983 action. The party who would be liable, were respondeat superior applicable, would be the State of New York, and there is no question but that the State is immune from this action.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED
AND THE COMPLAINT DISMISSED AS TO DEFENDANT-
APPELLANT PALISADES INTERSTATE PARK COMMISSION.

Dated: September 22, 1976

Respectfully submitted,

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of Counsel

AFFIDAVIT OF SERVICE

Alvin Trotman & Franklin Mitchell

vs.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Palisades Interstate Park
Commission, et al.

Beverly J. Smith

, being duly sworn, says:

I am over eighteen years of age and a typist
in the office of the Attorney General of the State of New York, attorney
for the appellants herein.

On the 30th day of September 1976 I served
the annexed brief and appendix upon the
attorney named below, by depositing two copies thereof,
properly enclosed in a sealed, postpaid wrapper, in the letter box
of the Capitol Station post office in the City of Albany, New York,
a depository under the exclusive care and custody of the United States
Post Office Department, directed to the said attorney s at the
address within the State respectively theretofore designated by
them for that purpose as follows:

James S. Carroll, III, Esq.
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Sworn to before me this

30th day of September 1976

Beverly J. Smith

Ralph D. Camacho

RAUL D. CAMACHO
Notary Public, State of New York
No. 4618149
Qualified in Albany County
Commission Expires March 30, 1977